a

HENRICK INTERNATIONAL HOTELS & RESORTS PTE LTD

v.

YTL HOTELS & PROPERTIES SDN BHD & ORS & ANOTHER CASE

b

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI AHMAD MAKINUDIN J
[CIVIL SUIT NOS: D3-22-427-1997 & D1-22-57-1998]
20 DECEMBER 2005

c ***COMPANY LAW:*** *Directors - Breach of fiduciary duties - Whether decision of directors to terminate hotel management contracts done in breach of fiduciary duties to company - Where substratum of company no longer exists*

d ***COMPANY LAW:*** *Directors - Powers of directors - Whether directors acted reasonably in interest of company in carrying out wishes of all shareholders - Honesty and reasonable diligence*

CONTRACT: *Termination - Estoppel - Representation - Whether plaintiff may reprobate on its expressed representation where it agreed for* e *termination of contract - Whether unconscionable for representor to enforce strict legal rights*

YTL hotels ('YTL'), headed by Dato' Mark Yeoh and Tan Sri Francis Yeoh, was incorporated with the object of venturing into the hotel and property business. As the company lacked experience and knowledge in the hotel f management business, the directors sought a suitable partner who had experience in the hotel industry and found Henrick International ('Henrick'), a company based in Singapore providing hotel management services. Carl Kono was then the President and CEO of Henrick. YTL and Henrick entered into a joint venture agreement to develop and manage hotels in Malaysia. The joint g venture entailed the formation of a joint venture company in Malaysia known as Trans Pacific Hotels Sdn Bhd ('Trans Pacific'), for the purpose of managing hotels in Malaysia. YTL and Henrick were the only shareholders of Trans Pacific in equal proportions. It was agreed that YTL would undertake the administration of Trans Pacific and provide hotels for Trans Pacific to manage. h On the other hand, Henrick was supposed to provide the actual hotel management services. Henrick then entered into a Management Support Services Agreement ('MSSA') with Trans Pacific for the provision of the hotel

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management services. YTL later procured three hotel management contracts for the benefit of Trans Pacific. The hotel management services were being provided substantially by Carl Kono and Henrick's key staff. However, after some time, some of Henrick's key staff began to leave Henrick. As a result of YTL's dissatisfaction with the management support services provided by Henrick, a meeting was held between Henrick and YTL's representatives. At that meeting both parties agreed to terminate the MSSA and the joint venture agreement. However, Henrick contended that it never agreed to terminate the hotel management contracts. YTL on the other hand contended that it was agreed at that meeting that all three hotel management contracts would be terminated. Further, Henrick contended that YTL had agreed to purchase Henrick's shares in Trans Pacific and that the valuation of its shares in Trans Pacific should include the value of the hotel management contracts. YTL, whilst agreeing to purchase Henrick's shares in Trans Pacific, argued that the price of those shares cannot include the hotel management contracts as parties had agreed to terminate the same. On the issues of misfeasance and breach of trust, the plaintiff relied on s. 132(1) and s. 132C(1) of the Companies Act, 1965 ('the Act').

Held (dismissing the plaintiff's claim with costs):

[1] The hotel management contracts were in fact terminated with the agreement of Henrick. Even if Henrick had not agreed to the termination of the hotel management contracts, the said hotel management contracts would have to be terminated as a result of the termination of the management support services agreement. (p. 184 g)

[2] Based on the factual circumstances of the case it cannot be said that any of the directors of Trans Pacific acted in breach of their fiduciary duties or obligations towards the company in terminating the hotel management contracts. Trans Pacific was a private limited company with only two shareholders, ie, Henrick and YTL. Both shareholders had set up the company specifically as a joint venture vehicle with which to carry out their joint venture operations. With the termination of the joint venture and the MSSA, the substratum of the company no longer can be said to exist. Both shareholders had also agreed to terminate the hotel management contracts. Therefore, the directors had acted reasonably and in the interest of Trans Pacific when they carried out the wishes of all shareholders of the company in terminating the hotel management contracts. (p. 190 f-g)

[3] The overriding factor that must be considered when directors exercise their powers is the interests of the company. The actions of the directors of Trans Pacific in terminating the hotel management contracts were carried

out honestly and with reasonable diligence. It cannot be said that any of the directors of Trans Pacific acted in breach of s. 132(1) of the Companies Act, 1965. (p. 191 c, f & g)

[4] Henrick having agreed to and authorised the directors of Trans Pacific to terminate the hotel management contracts, by its conduct and expressed representation, was estopped from turning around and insisting on the strict compliance of s. 132C(1). To allow Henrick to rely on s. 132C(1) of the Act would in effect allow it to reprobate on its expressed representation where it agreed to the termination of the hotel management contracts. (p. 192 e-g)

[5] All that a litigant who invokes the doctrine of estoppel must do is to show that he was so influenced by the encouragement or representation that it would be unconscionable for the representor to enforce his strict legal rights. There is no need to show that he was induced to act in a particular way. All that need be shown is that it would be unjust to permit the representor or encourager to insist upon his strict legal rights. A judge can also have regard to the conduct of the litigant raising the estoppel. (p. 192 g-h)

[6] Section 132(1) of the Act was inapplicable as the termination of the hotel management contracts was agreed by all shareholders of Trans Pacific and it was not "an acquisition or disposal of a substantial portion of the company's undertaking or property". As the MSSA had been terminated, Trans Pacific was incapable of performing its obligations under the hotel management contracts and the same were therefore rendered valueless. The hotel management contracts were in fact a liability and under no circumstances can they be considered a valuable undertaking or property of Trans Pacific. Therefore the plaintiff's reliance upon s. 132C(1) of the Act was misconceived and unsustainable. (p. 193 a-b)

Case(s) referred to:

Boustead Trading [1985] Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Charterbridge Corporation Ltd v. Lloyds Bank Ltd [1970] Ch 62 ***(refd)***

Greenhalgh v. Arderne Cinemas Ltd [1995] Ch 286 ***(refd)***

Howard Smith Ltd v. Ampol Petroleum Ltd [1974] AC 821 ***(refd)***

Marchesi v. Barnes & Keogh [1970] VR 434 ***(refd)***

Wisma Sime Darby Sdn Bhd v. Wilson Parking (M) Sdn Bhd [1996] 4 CLJ 194 CA ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 132(1), C(1)

For the plaintiff - Leong Wai Hong (Harold Tan Kok Leng); M/s Skrine
For 1st & 2nd defendants - Balvinder Singh (Prem Ramachandran); M/s Sri Ram & Co
For 3rd defendant & 4th defendant - Brendan Siva (Intan Nurul Faiza); M/s. Kadir Andri & Partners

Reported by Amutha Suppayah

JUDGMENT

Zulkefli Ahmad Makinudin J:

Introduction

The two Civil Suits D3-22-427-97 ["the D3 suit''] and D1-22-57-98 ["the D1 suit"] are consolidated suits and had been agreed upon by the parties to be heard and tried at one trial before me. For brevity and convenience, in this Judgment the first defendant in the D3 Suit, YTL Hotels and Properties Sdn. Bhd. shall be referred as "YTL hotels". The second defendant in the D3 Suit who is also the second defendant in the D1 Suit shall be referred to as "Dato' Mark Yeoh" whilst the third defendant in the D3 Suit who is also the first defendant in the D1 suit shall be referred to as "Tan Sri Francis Yeoh". The fourth defendant in the D3 suit who is also the third defendant in the D1 suit shall be referred to as "Carl Kono". The plaintiff in the D3 suit shall be referred to as "Henrick International" and the plaintiff in the D1 suit shall be referred to as "Trans Pacific" in this judgment.

The Plaintiff's Claim

D3 Suit

In the D3 Suit, Henrick International's claims are as follows:

Against YTL hotels

(a) for an order that YTL hotels buys Henrick International's 10,000 shares in Trans Pacific at a price of RM7,998,000 or at a price taking into account the projected future income of the three hotel management contracts to be assessed by Messrs. Ernst & Young within one month from the date of the court order.

(b) if YTL hotels does not comply with (a) above within (14) days from the order or assessment, an order that YTL hotels, Dato' Mark Yeoh, Tan Sri Francis Yeoh and Carl Kono pay damages of RM7,998,000 to Henrick International.

Against YTL hotels Dato' Mark Yeoh, Tan Sri Francis Yeoh and Carl Kono

(c) damages to be assessed for breach of the joint venture agreement and breach of fiduciary duties and ss. 132(1) and 132C(1) of the Companies Act 1965 as directors of Trans Pacific.

Against Carl Kono

(d) damages to be assessed for breach of contractual and/or fiduciary duty to Henrick International for not resigning as Henrick International's nominee director in Trans Pacific.

Against all the defendants

(e) interest and costs.

D1 Suit

In the D1 suit, Trans Pacific claims against Dato' Mark Yeoh, Tan Sri Francis Yeoh and Carl Kono as follows:

(a) declaration that the defendant's and each of them as directors have been guilty of misfeasance and breach of trust and duty in relation to Trans Pacific by making and causing the termination of the three hotel management contracts.

(b) payment by the defendant's jointly and severally the sum of RM7,998,000 or such damages to the assets of Trans Pacific as the court thinks proper.

(c) Interest and costs.

Facts Of The Case

The relevant facts involving the parties in both the suits D3 and D1 gathered from the oral and documentary evidence adduced are as follows:

(1) YTL hotels was incorporated on 3 May 1991 with the object of venturing into the hotel and property business. Dato' Mark Yeoh and Tan Sri Francis Yeoh were the directors of YTL hotel since its incorporation. As the company lacked experience and knowledge in the hotel management business, the directors sought a suitable partner who had experience in the hotel industry and who could provide the necessary hotel management skills for hotels to be developed by YTL hotels. Henrick International is a company based in Singapore and provides hotel management services.

(2) YTL hotels came to know of Henrick International after a meeting between Carl Kono and Tan Sri Francis Yeoh. Carl Kono was then the President and Chief Executive Officer of Henrick International. Subsequent to a meeting in early August 1991 between Carl Kono and Tan Sri Francis

Yeoh, Dato' Mark Yeoh went to Singapore sometime in September or October 1991 to attend a presentation organised by Henrick International of its hotel management capabilities and management philosophy. The presentation was held at Sheraton Towers Singapore. At the presentation, Dato' Mark Yeoh met Henry Ngo (PW1) who was then the Chairman of Henrick International. Carl Kono conducted the presentation and introduced Mr. William Hau, Mr. Bruno Dedual and Ms. Florence Tan and himself (Carl Kono) as Henrick International management team.

(3) At the same presentation, Dato' Mark Yeoh was given a document entitled Operational Methodology and Management Philosophy of Henrick International. Henrick International was promoted as a company with a unique and unmatched philosophy in hotel management.

(4) Dato' Mark Yeoh was interested in the management expertise of Henrick International and recommended Henrick International as a suitable joint venture partner for YTL hotels to the other directors of YTL hotels.

(6) At all material times, YTL hotels nominated Tan Sri Francis Yeoh and Dato' Mark Yeoh as its nominee directors in Trans Pacific. Henrick International on the other hand chose to nominate Carl Kono as its sole nominee director in Trans Pacific.

From the documentary and oral evidence adduced by the parties it can be said that the underlying intent and essence of the joint venture agreement between YTL hotels and Henrick International is that YTL hotels would undertake the administration of Trans Pacific and provide hotels for Trans Pacific to manage. These were hotels which were developed and/or owned by YTL hotels either solely or jointly with other corporations. On the other hand, Henrick International was supposed to provide the actual hotel management services.

In order to give effect to Henrick International's responsibility under the joint venture aggrement, it was a term of the agreement that Henrick International would enter into a Management Support Services Agreement ["MSSA"] with Trans Pacific for the provision of the hotel management services. This MSSA was entered into concurrently on 23 November 1991. The MSSA was a necessary and integral part of the joint venture between Henrick International and YTL hotels as it is related to the "operation" of Trans Pacific. In consideration of the Management Support Services that were to be provided by Henrick International to Trans Pacific under the MSSA, Henrick International was to be paid by Trans Pacific an annual fee as stated in the agreement. The joint venture agreement also provides for an irrevocable undertaking by YTL hotels to procure for Trans Pacific, hotel management contracts for at least one luxury international hotel in Kuala Lumpur, Malaysia by 31 January 1995.

As a result of the aforesaid joint venture agreement, Trans Pacific was set up as the joint venture company between YTL hotels and Henrick International to manage hotels in Malaysia. In keeping with its obligations, YTL hotels procured three hotel management contracts for the benefit of Trans Pacific. These are as follows:

(a) On 1 January 1992, Trans Pacific entered into a hotel management contract with Syarikat Pelancongan Pangkor Laut Sdn. Bhd. to manage the Pangkor Laut Resort. Syarikat Pelancongan Pangkor Laut Sdn. Bhd. is an affiliate company of YTL hotels and Tan Sri Francis Yeoh and Dato' Mark Yeoh are also directors of Syarikat Pelancongan Pangkor Laut Sdn. Bhd.

(b) On 21 May 1992, Trans Pacific entered into a hotel management contract with Prisma Tulin Sdn. Bhd. to manage the Henrick International Kuala Lumpur which was then still in the planning and construction stage and is now known as The Vistana Hotel Prisma Tulin Sdn. Bhd. is a joint venture company between YTL Corporation Berhad (an affiliate of YTL Hotels) and Arab-Malaysian Development Berhad. Tan Sri Francis Yeoh and Dato' Mark Yeoh are also directors of Prisma Tulin Sdn. Bhd.

(c) On 6 February 1993, Trans Pacific entered into a hotel management contract with East West Ventures Sdn. Bhd. to manage The Residence in Kuala Lumpur which was then still in the planning and construction stage and is now known as Ritz Carlton Hotel, Kuala Lumpur. East West Ventures Sdn. Bhd. is an affiliate company of YTL Hotels and Dato' Mark Yeoh is also a director of East West Ventures Sdn. Bhd.

[The aforesaid three hotel management contracts shall be jointly referred to hereinafter as "the hotel management contracts"].

It is noted that in keeping with the true intent and understanding of the joint venture agreement and the MSSA, Henrick International was to provide the hotel management services under the hotel management contracts.

The Pangkor Laut Resort was operational as at 1 January 1992 and Trans Pacific took over the management of this resort hotel immediately. The other two hotels were still under construction and Henrick International would have been obliged to provide hotel management services for these two hotels upon completion. The Vistana Hotel only commenced its operation in September, 1995 whilst the Ritz Carlton only commenced its operation sometime in 1996 (ie, after the termination of the joint venture agreement). However, in respect of the Vistana Hotel, Trans Pacific had already been paid a sum of RM250,000 by Prisma Tulin Sdn. Bhd. being 50% of the Pre-Opening Fees pursuant to cl. 3.5 of the hotel management contract.

The hotel management services were being provided substantially by Carl Kono. He was assisted by Bruno Dedual who was responsible for Food and Beverage, Florence Tan who was responsible for purchasing and William Hau who was responsible for Finance. Carl Kono was responsible for supervising and providing overall operational management for the Pangkor Laut Resort.

After some time, some of Henrick International's key staff began to leave Henrick International. Florence Tan left Henrick International sometime in late 1992 or early 1993. Subsequently, Bruno Dedual left Henrick International in January of 1994. YTL hotels was not satisfied with the state of affairs concerning the departure of some of Henrick International's key staff. Dato' Mark Yeoh indicated to Carl Kono (Henrick International then representative), that if the state of affairs did not improve with the introduction of new managers of similar capabilities and skill, it would be difficult for Henrick International to continue to provide hotel management services once the other two hotels were operational. Carl Kono's response was that it was not up to him to introduce new managers and his hands were tied. Carl Kono informed Dato' Mark Yeoh that he (Carl Kono) had some differences and disagreements with Henry Ngo (PW1) on this issue and that he (Carl Kono) had tendered his resignation to Henrick International in August, 1994. Carl Kono's contract of employment with Henrick International stipulated that he had to give notice of six months for his resignation. Carl Kono was due to leave Henrick International sometime in February, 1995.

However, by a letter dated 9 November 1994, Carl Kono was terminated by Henrick International as its President and Chief Executive Officer with immediate effect. Carl Kono informed Dato' Mark Yeoh of this fact and YTL hotels decided to offer Carl Kono a position of employment in YTL hotels. Carl Kono accepted the position and commenced employment with YTL hotels on 15 November 1994 as its Executive Vice President of Operations.

Carl Kono continued to provide hotel management services to Pangkor Laut Resort after his services were terminated by Henrick International. However, with effect form 16 November 1994, Carl Kono provided hotel management services to Pangkor Laut Resort as an employee of YTL hotels and not as an employee of Henrick International or Trans Pacific. A fresh hotel management contract relating to Pangkor Laut Resort was entered into between YTL hotels (as manager) and Syarikat Pelancongan Pangkor Laut Sdn. Bhd. on 16 November 1994.

The Dispute And The Issues To Be Tried

As a result of the departure of Henrick International's key staff, culminating with the departure of Carl Kono himself, Henrick International must have realized that YTL hotels would be dissatisfied with the hotel management services

provided by Henrick International. As a result of YTL hotels dissatisfaction with the management support services provided by Henrick International in particular its inability to continue to provide the said services, a meeting was held between Henrick International and YTL hotels representatives in Singapore on 25 November 1994. It is not disputed that at that meeting both parties agreed to terminate the MSSA and the joint venture aggrement between themselves. However, Henrick International contends that it never agreed to terminate the hotel management contracts. YTL hotels on the other hand contends that it was also agreed at that meeting that all three hotel management contracts would be terminated effective from 15 November 1994. Pursuant to the said agreement, YTL hotels proceeded to terminate the hotel management contracts effective from 15 November 1994.

Further, Henrick International contends that YTL hotels had agreed to purchase Henrick International's shares in Trans Pacific at the meeting of 25 November 1994. Henrick International contends that the valuation of its shares in Trans Pacific should include the value of the hotel management contracts. YTL hotels, whilst agreeing that pursuant to the decision of both parties to terminate the joint venture between themselves, YTL hotels would purchase Henrick International shares in Trans Pacific, the price of those shares cannot include the hotel management contracts as parties had agreed to terminate the same. Further, YTL hotels had never agreed to include the value of the hotel management contracts to the shares of Trans Pacific. This is essentially the central dispute between the parties.

At the trial of the consolidated suits, the plaintiff's called two witnesses namely, Henry Ngo (PW1), a director of Henrick International and Robin Chin (PW2), a chartered accountant practicing at M/s. Foo, Kon Tan and Grant Thornton in Singapore. YTL hotels, Tan Sri Francis Yeoh and Dato' Mark Yeoh were represented by Dato' Mark Yeoh (DW1) as their sole witness. Dato' Mark Yeoh is the Executive Director of YTL hotels. Carl Kono (DW2) gave evidence on his own behalf at the trial.

Decision Of The Court

It is my finding that the hotel management contracts were in fact terminated with the agreement of Henrick International. Even if Henrick International had not agreed to the termination of the hotel management contracts, the said hotel management contracts would have to be terminated as a result of the termination of the management support services agreement. It is my considered view if the hotel management contracts had not been terminated, the plaintiff's would have exposed themselves to suits for breach of contract as the plaintiff's would have been unable to provide the management services as obliged under the hotel management contracts. The termination was therefore in the best

interest of the plaintiff's. I find that the defendants' concerned had in fact acted honestly and used reasonable diligence in the discharge of their duties as directors of the plaintiff [Trans Pacific].

The discussions and agreements between the parties arrived at the meeting of 25 November 1994 are of great importance and significance to the central issue in this case. YTL hotels contends that Henry Ngo (PW1) agreed to the termination of the hotel management contracts with effect from 15 November 1994 at this meeting. Henrick International however maintains that no such agreement was reached. In fact, Henrick International claims that it was not even aware that YTL hotels had, subsequent to the meeting, terminated the hotel management contracts with effect from 15 November 1994. Henrick International contends that they only became aware of the termination of the hotel management contracts when they received YTL hotels letter dated 24 April 1995.

I find Henry Ngo's evidence-in-chief regarding the meeting on 25 November 1994 rather brief. His evidence is that parties agreed to terminate the MSSA with effect from end of December, 1994. Henrick International agreed to do so as YTL hotels was unhappy with the services provided and it was gentlemanly of Henrick International to agree to the termination. He goes on to say that Dato' Mark Yeoh suggested that the joint venture be dissolved by Henrick International selling its interest in Trans Pacific to YTL hotels. He goes on to state as follows:

> For the purpose of valuing the fair price, it was agreed that an independent audit firm be appointed to value the price of the shares in Trans Pacific at a fair price. Messrs. Ernst & Young was later appointed as auditors to value the price of the shares in Trans Pacific.

Earlier in his evidence-in-chief, Henry Ngo states that subsequent to his meeting with Tan Sri Francis Yeoh on 3 November 1994, later on the same day, he met Dato' Mark Yeoh. In that meeting, Dato' Mark Yeoh suggested that two of the three hotel management contracts be terminated leaving only one behind. He states that he did not agree to the suggestion as there was no reason why any of the three hotel management contracts are to be terminated. In the light of the minutes of the meeting of 25 November 1994 (exh. D3), I find this discussion could not have taken place on 3 November 1994. Henry Ngo agreed that exh. D3 was prepared by him a few days after the said meeting with Dato' Mark Yeoh and that a copy of exh. D3 was never given to Dato' Mark Yeoh.

I find exh. D3 which was prepared by Henry Ngo does not make any reference to the agreement to terminate the MSSA. However, Henry Ngo has admitted that the parties agreed to terminate the MSSA with immediate effect. This

goes to show that exh. D3 is not a complete and accurate account of what transpired at the meeting of 25 November 1994. Certain important and pertinent details have clearly been omitted by Henry Ngo in exh. D3. Nevertheless, the plaintiff's attempted to suppress this document. In my view the contents of this document to a large extent appears to support the version of events as stated by YTL hotels.

In his evidence-in-chief, Dato' Mark Yeoh stated that after the departure of Carl Kono from Henrick International the position of Henrick International became quite uncertain as it was apparent that Henrick International could no longer provide the management support services. After some discussion with Henry Ngo over the telephone, YTL hotels decided to have a meeting to discuss the position of the joint venture aggrement. A meeting was held between Henry Ngo and Dato' Mark Yeoh in Singapore at Henry Ngo's office. It is contended by Dato' Mark Yeoh that this is the meeting of 25 November 1994 although he does not recall the exact date of the meeting.

Dato' Mark Yeoh's version of what transpired at the meeting is that it was agreed at that meeting that Henrick International could no longer provide management support services to Trans Pacific under the hotel management contracts with the departure of Henrick International's key staff, particularly Carl Kono. Dato' Mark Yeoh then suggested that two of the hotel management contracts be terminated. Since Trans Pacific had already been paid 50% of the pre-opening fees amounting to RM250,000 by Prisma Tulin Sdn. Bhd. for services that were yet to be provided to the hotel now known as the Vistana hotel, the hotel management contract for this hotel should continue. However, according to Dato' Mark Yeoh, Henry Ngo rejected this suggestion. He was of the opinion that Trans Pacific should either continue with all three hotel management contracts or alternatively all three contracts should be terminated. Henry Ngo was not prepared to provide management support services for only one hotel. Dato' Mark Yeoh then took the position that since it had been agreed that Henrick International could not provide management support services for all three hotels, it would be imprudent to continue with all three hotel management contracts. This would have exposed Trans Pacific to liability and damages to the hotels for breach of the management contracts. It was then agreed that all three hotel management contracts be terminated with effect from 15 November 1994.

I find Dato' Mark Yeoh's evidence on this issue is also corroborated by Carl Kono's evidence-in-chief where he says that Dato' Mark Yeoh informed him sometime in December 1994 that he had met with Henry Ngo and that the parties had agreed to terminate the MSSA and the hotel management contracts. He was also informed that YTL hotels had agreed to purchase Henrick International's shares in Trans Pacific and put an end to the joint venture

between them. Carl Kono states that this was the natural consequence of Henrick International's decision to terminate him on 9 November 1994, as without him Henrick International was no longer in a position to perform its obligations under the MSSA and the hotel management contracts. He found the termination to be logical and did not see anything untoward or suspicious about it.

I further find the above version of events appears to find some support in the minutes of the meeting at exh. D3. The minutes state as follows:

> Mark Yeoh indicated that Yeoh Tiong Lay Sdn. Bhd. ('YTL') wish to terminate the two management agreements signed between Trans Pacific Hotels Sdn. Bhd. ('Trans-Pacific), Pangkor Laut and East West Ventures Sdn. Bhd. The contract between Trans-Pacific and Prisma Tulin Sdn. Bhd. for the management of the Kuala Lumpur Hotel will continue.
>
> Henry Ngo was of the opinion that it would not be appropriate for the Trans-Pacific to agree to the termination of the two management contracts leaving only one as they are valid contracts. He was of the opinion that all the contracts should continue. If not, all contracts be terminated.

It is clear from the minutes of the meeting prepared by Henry Ngo himself, that the discussion was mainly regarding the future of the hotel management contracts. In fact, Henry Ngo had agreed that if YTL hotels only wished to continue with one contract, all three contracts should be terminated. The minutes however do not record Dato' Mark Yeoh's acceptance to Henry Ngo's alternative suggestion that all three contracts should be terminated.

When confronted by exh. D3 which Henry Ngo himself prepared, Henry Ngo had no choice but to admit during cross-examination that it was agreed at the meeting of 25 November 1994 that the management contracts be terminated with effect from 15 November 1994. Henry Ngo goes on to admit that the agreement to terminate the three hotel management contracts has not been mentioned in exh. D3. This is clearly a broad departure by the plaintiffs from their pleaded case where it is alleged that Henrick International had not consented to the termination of the three hotel management contracts and in fact was not aware of the said termination until receipt of YTL hotels' letter dated 24 April 1995. With this admission, it is submitted that the plaintiffs' entire case had collapsed. Since Henrick International had consented and agreed to the termination of hotel management contracts by Trans Pacific, the question of the defendants being in breach of their obligations and duties as directors of Trans Pacific does not hold water. Henrick International's claim that it was kept in the dark until 24 April 1995 is a clear afterthought.

I find that the allegation by Henrick International that it was not aware of the termination of the hotel management contracts until it received the letter dated 24 April 1995 from YTL hotels is also credibly disputed by the minutes of a meeting held on 10 March 1995. These minutes are marked as exh. D4. At para. 2 of the minutes, it is stated that:

> Since the management contracts have been terminated, he proposed that shares be valued at net book value as at 31 December 1994 and that Bonvests sells its 50% interest at NBV.

The minutes of this meeting show that there was no protest or expression of surprise by any of the three representatives of Henrick International who were present at the meeting when it was mentioned that the hotel management contracts had been terminated. Henry Ngo's response to this evidence is that he was taken by surprise and protested at that meeting. However, this has not been recorded in the minutes. This explanation is clearly an afterthought as the minutes were prepared by Henrick International and it did not contemporaneously dispute the same.

In respect of the joint venture which had been terminated between themselves, it is my finding YTL hotel agreed to purchase Henrick International's shares in the company ("Trans Pacific Hotels Sdn. Bhd.") at fair market value without taking into consideration the hotel management contracts which had been terminated. I further find as Henrick International could not agree on the price of the shares to be purchased by YTL hotels, the agreement to purchase the said shares could not be performed.

YTL hotels contends that the share purchase agreement was conditional upon the parties agreeing on the price of the shares of Henrick International in Trans Pacific. Although it was agreed that the price should be determined by an independent audit firm and M/s Ernst & Young were later appointed for this purpose, there was a disagreement between the parties as to the basis of the valuation by the independent auditors. Henrick International contended that the valuation of the shares of Trans Pacific should include the value of the hotel management contracts. However, YTL hotels' was not in agreement with this as the hotel management contracts had been terminated and YTL hotels' position was that the shares of Trans Pacific should be valued on a net assets basis. This was clearly a dispute which rendered the share purchase agreement incapable of performance. To put it simply, the consideration for Henrick International's shares in Trans Pacific could not be agreed.

It is my finding that the basis of valuation of the shares was never discussed or agreed upon at the meeting of 25 November 1994 or subsequently in order to create a valid and binding agreement. Henry Ngo admits in cross-examination that the independent auditors were appointed to value the shares of Trans Pacific

in order to facilitate the purchase of Henrick International's shares in Trans Pacific by YTL hotels. He goes on to agree that exh. D3 does not make any mention of the basis for the valuation of the shares in Trans Pacific. He also agrees "that I was under the impression that the valuation of the Trans-Pacific shares would include the value of the three management contracts." Henry Ngo goes on to state in cross-examination, "It was my impression that the valuation of Trans-Pacific shares would include the value of the three management contracts. I do not agree that YTL hotels has always maintained their stand that the value of the management contracts cannot be taken into consideration in valuing the shares of Trans-Pacific. I agree that YTL hotels' position was that Trans-Pacific's shares should be valued at net book value."

The above evidence of Henry Ngo clearly supports the position of YTL hotels that it had never agreed to the inclusion of the value of the hotel management contracts in determining the price of the shares of Trans Pacific. Without such an agreement, it cannot be said that there was a concluded contract between the parties as suggested by Henrick International.

The fact that parties were in disagreement as to the method of valuation of the shares of Trans Pacific is clearly demonstrated by the minutes of a meeting held between the parties on 10 March 1995. At that meeting, YTL hotels was represented by Dato' Mark Yeoh whilst Henrick International was represented by Henry Ngo, William Hau and Madam Tan Guek Ming. At that meeting, YTL hotels reiterated its position that the shares should be valued at net book value (NBV) since the hotel management contracts had been terminated and are no longer part of the assets of Trans Pacific. The meeting ends without any agreement between the parties as to the method of valuation. This document was put to Henry Ngo during cross-examination and he agreed "that the share purchase agreement could not be performed as parties could not agree on the method of valuation of the shares of Trans Pacific."

During re-examination, Henry Ngo testified that he only agreed to terminate the three management contracts "with proper compensation". This however does not help Henrick International's claim as the issue of compensation was never even discussed, let alone agreed upon at the meeting of 25 November 1994. In so far as YTL hotels was concerned it had only agreed to the purchase of Henrick International's shares in Trans Pacific at net book value. Henrick International however did not agree to the said basis for the purchase. Dato' Mark Yeoh testified that the question of any compensation to Henrick International never arose and was never discussed at the meeting. He goes on to state that in view of Henrick International state of position at that time to perform its obligations under the joint venture, it would have been inconceivable for YTL hotels to agree to pay Henrick International any form of compensation.

Consequently, the share purchase agreement cannot be said to be a concluded agreement capable of being performed. On this point I would like to refer to the case of *Wisma Sime Darby Sdn. Bhd. v. Wilson Parking (M) Sdn. Bhd.* [1996] 4 CLJ 194 CA wherein it was held by the Court of Appeal *inter alia* that the courts will not lend their aid to the enforcement of an incomplete agreement. In that case, the rental for the renewed period of tenancy had to be agreed by the parties. The agreement for renewal was therefore executory and there was no machinery or formula for the court to ascertain the rent if the parties could not come to an agreement on the same. The Court of Appeal held that on authority and on principle, the alleged agreement was bad for uncertainty. It was held that the option clause for a further term of rental at "a rent to be agreed" was void for uncertainty. The Court of Appeal also held that it could not be said that it was implied that the appellants' should have done all that was reasonably necessary to ensure that the parties reached an agreement because that would be asking the court to add yet another clause to the agreement. In any event, neither parties nor the court may insist that the parties come to an agreement. The court went further to state that the fact that the respondents in that case believed that there would be a renewal of the tenancy and went about their business on the basis of such belief did not *per se* estop the appellants from taking the position that there would be no renewal of the tenancy or do away with the requirement that an agreement had to be arrived at on rental before there was renewal. There was no representation that the respondents had acted upon their detriment entitling them to rely on estoppel.

It is also my finding that based on the factual circumstances of the case, it certainly cannot be said that any of the directors of Trans Pacific acted in breach of their fiduciary duties or obligations towards the company in terminating the hotel management contracts. In considering the issue of whether any misfeasance has been committed by any of the directors of Trans Pacific, I am of the view regard must be had to the structure of Trans Pacific as a company. Trans Pacific was a private limited company with only two shareholders, ie, Henrick International and YTL hotels. Both shareholders had set up the company specifically as a joint venture vehicle with which to carry out their joint venture operations. With the termination of the joint venture and the MSSA, the substratum of the company no longer can be said to exist. Both shareholders had also agreed to terminate the hotel management contracts. With this in mind, it can only be concluded that the directors had acted reasonably and in the interest of the Trans Pacific when they carried out the wishes of all shareholders of the company in terminating the hotel management contracts. In fact, upon the termination of the MSSA, Trans Pacific would have been incapable of performing its obligations under the hotel management contracts. This would have exposed Trans Pacific to liability to the respective hotels.

Therefore, at that stage, the hotel management contracts were more a liability to Trans Pacific rather than its assets.

On the issues of misfeasance and breach of trust, the plaintiffs' rely on s. 132(1) and s. 132C(1) of the Companies Act, 1965 ["the Act"]. Section 132(1) of the act states as follows:

> A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

In the case of *Marchesi v. Barnes & Keogh* [1970] VR 434, it has been held *inter alia* that to "act honestly" refers to acting *bona fide* in the interest of the company in the performance of the functions attaching to the office of directors. In my view therefore the overriding factor that must be considered when directors exercise their powers is the interests of the company. It was held in the case of *Greenhalgh v. Arderne Cinemas Ltd* [1995] Ch 286 that the collective interest of the members of the company (shareholders) can be equated with the interest of the company. In the case of *Charterbridge Corporation Ltd. v. Lloyds Bank Ltd*. [1970] Ch 62, it was held that the proper test is whether an intelligent and honest man in the position of a director of the company concerned could in the whole of the existing circumstances have reasonably believed that the transaction was for the benefit of the company. On merits of management decisions *Lord Wilberforce* in the case of *Howard Smith Ltd. v. Ampol Petroleum Ltd*. [1974] AC 821 at p. 832 had this to say:

> There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

Based on the aforesaid principles, it is my view that the actions of the directors of Trans Pacific, in particular Dato' Mark Yeoh in terminating the hotel management contracts were carried out honestly and with reasonable diligence. Dato' Mark Yeoh acted not only with the best interest of Trans Pacific in mind but also upon the agreement of all the shareholders of Trans Pacific, ie, Henrick International and YTL hotels. Where all the shareholders of a company have agreed to take a particular course of action in relation to a particular undertaking of the company and the directors put the same into effect, under no circumstances can it be alleged that the directors acted dishonestly or without reasonable diligence. Therefore, it cannot be said that any of the directors of Trans Pacific acted in breach of s. 132(1) of the Companies Act 1965.

With regard to the plaintiffs' reliance on the provision of s. 132C(1) of the Act it provides as follows:

> (1) Notwithstanding anything in a company's memorandum or articles, the directors shall not carry into effect any proposal or execute any transaction for:
>
> (a) the acquisition of an undertaking or property of a substantial value; or
>
> (b) the disposal of a substantial portion of the company's undertaking or property,
>
> which would materially and adversely affect the performance or financial position of the company, unless the proposal or transaction has been approved by the company in general meeting.

Assuming that the termination of the hotel management contracts amounts to a "disposal of a substantial portion of the company's undertaking or property, which would materially and adversely affect the performance or financial position of the company", it would appear at first instance that the directors of Trans Pacific would have required the approval of the company in a general meeting before terminating the hotel management contracts. It must be remembered however that Trans Pacific was a private limited company with only two shareholders, both of whom had specifically agreed to the termination of the hotel management contracts at the meeting of 25 November 1994. The question that arises is whether one of the shareholders, ie, Henrick International having agreed to and authorised the directors of Trans Pacific to terminate the hotel management contracts, can now turn around and insist on the strict compliance of s. 132C(1). I am of the view that Henrick International by its conduct and expressed representation, is estopped from doing so. To allow Henrick International to rely on s. 132C(1) of the Act would in effect allow it to reprobate on its expressed representation where it agreed to the termination of the hotel management contracts with effect from 15 November 1994. On this point, I would refer to the Federal Court decision in *Boustead Trading [1985] Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283. In *Boustead's* case, it was held that the doctrine of estoppel applies to both representations of fact and law. All that a litigant who invokes the doctrine of estoppel must do is to show that he was so influenced by the encouragement or representation that it would be unconscionable for the representor to enforce his strict legal rights. There is no need to show that he was induced to act in a particular way. All that need be shown is that it would be unjust to permit the representor or encourager to insist upon his strict legal rights. A judge would also be entitled to have regard to the conduct of the litigant raising the estoppel.

In any event, it is my finding that s. 132(1) of the Act is inapplicable as the termination of the hotel management contracts was agreed by all shareholders of Trans Pacific and it was not "an acquisition or disposal of a substantial portion of the company's undertaking or property". As the MSSA had been terminated, Trans Pacific was incapable of performing its obligations under the hotel management contracts and the same were therefore rendered valueless. The hotel management contracts were in fact a liability and under no circumstances can they be considered a valuable undertaking or property of Trans Pacific. In my view therefore the plaintiffs' reliance upon s. 132C(1) of the Act is misconceived and unsustainable.

Conclusion

For the above stated reasons, it is my finding that the plaintiff's have failed on the balance of probabilities to prove any of the causes of action as pleaded in their statement of claim. It is also my finding that the plaintiff's have failed to prove that they suffered any loss or damage as a consequence thereof and that they have also failed to prove the said damages. The plaintiffs' claim in the D3 Suit and the D1 Suit against YTL hotels, Tan Sri Francis Yeoh, Dato' Mark Yeoh and Carl Benjamin Kono are hereby dismissed with costs.